

A Bad Workman Blames His Tools

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A faint feeling of futility is what you might experience if you look at the EU's efforts to fight the erosion of the rule of law and what they have achieved so far. The right-wing populist landslide, foretold by some, has failed to materialise in the EP elections, but that does not apply to countries where the right-wing populists are in government: In Poland, Hungary and Italy they have won triumphantly. Hungary's Fidesz party is just making itself comfortable in the EPP again with a ostentatiously unapologetic grin on its face, and while everyone is busy worrying over Poland, Bulgaria's governing party, firmly anchored in the EPP, feels secure enough to undertake a rather blunt attempt to subjugate its independent judiciary of its own. Malta has a so-called "social democratic" government which is nonetheless frighteningly successful in its efforts to make their commitment to the rule of law a matter of political expediency while no one in Europe seems even to bother. The exception that confirms the rule is Romania whose also "social democratic" governing party apparently did pay a political price for its attacks on the independence of the judiciary, and a criminal-law price on top of it.

The realisation that the EU is in real and existential trouble with respect to the rule of law is now largely a matter of course in most parts, but helplessness prevails all the more about the question of what can be done about it. The EU Commission has announced to come forward with new proposals in June. In preparation, there was a workshop organised by Carlos Closa and Miguel Maduro on Friday at the European University Institute in Florence at which the current Vice-President and *Spitzenkandidat* for President of the EU Commission, Frans Timmermans, consulted with a round of heavyweight experts and stakeholders, including members of half a dozen constitutional courts. I had the privilege to attend, and to anticipate the outcome: the EU's toolbox is not as empty as it sometimes seems. A great deal could actually be done. Which raises the question of why it isn't.

Outsourced

At the moment all hopes seem to focus on the European Court of Justice: In two weeks, the Court will hand down its decision on the question of whether Poland's forced retirement scheme for its Supreme Court has violated its treaty obligation to preserve the independence of its judiciary. The options available to the ECJ in this regard were the subject of an [online symposium](#) on Verfassungsblog last week, and few doubt that the answer will be in the affirmative, which would, in conjunction with a number of other referral and infringement decisions, effectively take most of the fun out of suppressing the judiciary for the PiS government, or so we hope.

To dump the whole responsibility for ensuring the rule of law in Poland on the ECJ means, however, that others can go unburdened by it – a depoliticisation of this epochal conflict, as if preserving the rule of law were not a matter of political will but

solely of legal necessity. Whether such uncritical legalism is favourable for the court is disputable from a judicial perspective, too, which became very clear in Florence (Chatham House rules applied). Three members of different constitutional courts expressed great concern about the increasing use of the judiciary to arbitrate hot political conflicts. One warned against the tendency of the judiciary to succumb to the "intellectual temptation" of regarding themselves competent to decide what's best for all. One judge, however, emphasized that constitutional courts are *per se* political and have to deal with it. (That judge came from a court which had suffered some loss of authority for being perceived as too political.)

I wish I knew what the ECJ and its President Koen Lenaerts think about this, but I don't. Additionally, the position of the Luxembourg court is being made delicate by the fact that its judges, for their part, are elected in a way that is not exactly orthodox either: political selection, a non-transparent procedure, a short term of office with the possibility of re-election – not entirely what the Venice Commission [recommends](#) to ensure judicial independence, one must say.

Speaking of the Venice Commission: another variant of outsourcing the fight for the rule of law in Europe is the installation of independent expert committees. Manfred Weber recently brought up [something like this](#), with help from the former constitutional judge turned writer/pundit/high-yield-expert-opinions-deliverer Udo Di Fabio. This may have been a smart move from a PR point of view, with Weber, who until recently smothered Orbán with his love and affection, suddenly staging himself as quite the determined fighter against those terrible, terrible rule of law endangerers. In terms of substance, however, Weber's proposal for an independent monitoring body consisting of nine retired constitutional judges (in the image of Di Fabio, one might suspect), exuding wisdom and benignancy and lacking all political authority and clout, would amount to little more than reinterpreting the question of political will as a question of academic knowledge and to further depoliticize the fight for the rule of law.

The toolbox is not empty

Weber is also one of those who like to complain a lot about how terribly ill-equipped the EU is for this fight. Article 7, rule-of-law dialogue, infringement proceedings – oh dear, none of this really helped, it all takes too long, it can be blocked by the states concerned! "The tools were all there at the beginning of this crisis," one of the participants in Florence remarked dryly, "but the crisis was taken as a sign that there are no tools".

Two professors of European law well known to the readers of Verfassungsblog, Laurent Pech and Dimitry Kochenov, together with seven other experts, have recently compiled a wealth of suggestions and ideas for the Commission on what could be done with the existing instruments. Some of their suggestions were already elaborated on here on Verfassungsblog, such as [Kim Scheppele and Dan Kelemen's](#) hint (courtesy of [Israel Butler](#)) that the EU Commission can already withhold structural funds on the basis of existing secondary legislation if there is a "serious deficiency in the effective functioning of the management and control

system of the operational programme" (Art. 142 EU Directive 1305/2013). Or [András Jakab's](#) suggestion to the European Parliament to defend itself against infiltration by members who owe their mandate to a democratically questionable election.

Taking up all these tools and using them in a transparent and visible way would also have the advantage that they would make tangible and give case quality to what is actually happening all the time in Hungary, Poland and elsewhere. There are still many who find that quite literally unbelievable, and it's easy to see why: that no-one in Hungary will ever get a cent of EU funding but the Orbán cronies who fund his party, that EU money is actually what keeps this kleptocratic regime [financially afloat](#) the way oil does with any old petrostate dictatorship – it's not an easy thing to wrap your head around. That Hungary imprisons refugees and at the same time [refuses them food](#) until they "voluntarily" leave for Serbia, and that every single person concerned must first obtain an injunction at the Human Rights Court in Strasbourg in order to, for Christ's sake, *eat*. That a [judge from Gdansk](#) is accused right now by the disciplinary prosecutor of having received "financial gratification" from a defendant which, it turns out, was in fact the "Gdansk equality award" she had been given by the late city president and victim of right-wing extremist murder Paweł Adamowicz, to mention just one of countless equally or even more belief-defying cases of disciplinary harassment and intimidation of judges happening at this very moment in Poland. Yes. You wouldn't want to believe that. You'd much prefer to keep that away from you. You'd much rather close your eyes really tight. The least the Commission, the Council and the other institutions involved can do is to make us open them.

Air supply

In **Bulgaria**, as already mentioned, the government is trying to get the president of the Supreme Court of Cassation, one of its harshest critics, under its disciplinary control. [SIMEON STOYCHEV](#) reports what this is all about.

In **Germany**, the independence of the judiciary may be less safe as one might think, according to some. On the occasion of the recent judgment of the ECJ in the matter of German public prosecutors and EU arrest warrants, [THOMAS GROSS](#) demands to reduce the political influence on the appointment of judges and thus to improve the constitutional resilience of Germany.

The **German** debate about the introduction of a basic pension threatens to be stifled by constitutional objections of questionable merit, and [ASTRID WALLRABENSTEIN](#) is doing her best to provide it with some oxygen.

[LAURA DEREJE](#) joins the discussion about Youtube stars blamed by CDU chairwoman Annegret Kramp-Karrenbauer for wielding unregulated "opinion-making power" in **Germany**, and calls for some minimum standards of diligence for "amateur journalists".

[KONRAD LACHMAYER](#) and [LUKAS WIESER](#) map the uncharted constitutional territory entered by **Austrian** politics with the fall of Chancellor Kurz and the formation of a temporary expert government.

[DENNIS-KENJI KIPKER](#) analyses the **German** government considerations as to how to answer to a cyber attack from abroad, and [BENJAMIN DERIN](#) does the same with the cabinet plans to curtail the criminal procedural rights of accused persons and defenders.

Elsewhere

[EMIL W. LORENZ](#) examines whether the Speaker of the **German Bundestag** was entitled to reprimand an AfD MP for his attacks against the head of state.

[JULIAN CLARENNE](#) criticises the failure of the ECtHR to problematise the competence of parliamentary committees to resolve post-electoral conflicts in a **Belgian** case.

[LYNDA COLLINS](#) demands that environmental sustainability should be recognized as an unwritten constitutional principle in **Canada**.

[BENJAMIN FARGEAUD](#) asks whether it serves parliamentarianism well in **France** to hand over a right-wing extremist denying the Holocaust at a parliamentary hearing to the judiciary.

[JOHN T. NELSON](#) is not convinced that Julian Assange will be extradited to the **USA**.

[THOMAS E. KELLOGG](#) is concerned about plans in **Hong Kong** to facilitate extradition to China.

So much for this week. By the way, in case you wonder why you receive this notice later than usual: on the way back from Florence my sleeper train, already two and a half hours late, came to an unscheduled halt in a hamlet called Tittmoning-Wiesmühl and didn't go any further; I have spent the rest of Saturday making my way back to Berlin from that untrodden spot of Bavarian idyllic rurality. It's now half past six in the evening, I am somewhere between Bamberg and Erfurt after another train broke down in Upper Franconia (isn't that just my luck), I have stopped counting the train changes and haven't eaten anything all day except for a *Leberkässemmel* at Munich Central Station and yet I am *still* firmly convinced that it should be possible to take a train from A to B in Germany.

All the best for you, and take care,

Max Steinbeis

